

# Memorandum



*United States Attorney  
Western District of Washington*

Subject	Date
Backpage.com Investigation	April 3, 2012
To	From
Jenny Durkan	Aravind Swaminathan Catherine Crisham

## **I. Introduction**

This memorandum is intended to summarize current legal and factual analysis into a potential prosecution against Backpage.com, LLC ("Backpage"). First, the memorandum describes how Backpage's website operates and outlines the various procedures the company has implemented to prevent trafficking and child exploitation, as well as steps it has taken to cooperate with law enforcement. Second, it examines two potential legal theories for a prosecution against Backpage, and ultimately concludes that the only viable avenue of prosecution is under Title 18, United States Code, Section 1591(a)(2). Third, the memorandum discusses some of the proof issues that will likely arise in any prosecution against Backpage pursuant to Section 1591, including constitutional issues raised in similar contexts. These include issues that became apparent to us during the course of our preliminary investigation, as well as certain matters that were brought to our attention by FBI agents who routinely work child sex trafficking cases. Finally, the memorandum summarizes a proposed avenue of prosecution and the potential challenges in proving a crime against Backpage.

## **II. Backpage**

### **A. Backpage and Current Public Reactions**

Backpage is a free classified advertisements service that operates very similarly to Craigslist. Users can place classified advertisements for a fee by visiting the Backpage domain. Advertisements are grouped by region, and Backpage offers services for metropolitan regions across all fifty states and the District of Columbia, as well as several foreign countries, including Canada, Mexico, and South Africa. Exhibit 1.

Each metropolitan community Backpage website categorizes classified advertisements into one of several categories, such as "community," "automotive," "rentals," "jobs," and "adult." The "adult" sections are divided up into sub-categories: "escorts," "body rubs," "strippers & strip clubs," "dom & fetish," "TS [transsexual]," "male escorts," "phone & websites," and "adult jobs."

In September 2010, under intense pressure from several state Attorneys General,

Craigslist closed down its Adult Classified section, which was very similar to the adult entertainment section offered by Backpage. Since Craigslist eliminated its adult services advertisements, analysts estimate that Backpage has generated approximately \$23.1 million in revenue from advertisements posted in its “escorts” and “body rubs” sub-categories. *See* Exhibit 2, “Backpage sees 50 percent annual gain in online escort-ad revenue,” [aimgroup.com](http://aimgroup.com) (2011). These revenue estimates do not include revenues generated from Backpage sites in Canada, Australia, Ireland and other foreign countries. According to research conducted by Complete.com, unique visitors to Backpage sites increased from approximately 1.8 million in August 2010 to approximately 3.25 million in May 2011. In the same period of time, “escort” and “body rub” listings at Backpage increased from an estimated 82,000 to 100,000. Since August 2010, Backpage’s revenues from advertisements believed to be linked to prostitution were estimated to be approximately five times higher than its next competitor, Eros.com.

The National Association of Attorneys General (“NAAG”) have continued to exert pressure on Backpage to close down the adult entertainment portion of its website. In connection with those efforts, the NAAG, headed by the Washington State Attorney General, has requested information from Backpage on certain aspects of its operations, which Backpage claims are proprietary. Recently, on March 23, 2012, the NAAG received a letter from Backpage’s general counsel, addressing some of the NAAG’s concerns about Backpage and including some background materials. This letter makes clear that Backpage has no intent of eliminating the adult category from its website, on the grounds that its actions are protected under the First Amendment and the Communications Decency Act. *See* Exhibit 3, Letter from Village Voice Media Holdings, LLC, Office of General Counsel, Elizabeth McDougall to National Association of Attorneys General, dated March 23, 2012.

As mentioned above, Backpage has very recently – and for the first time – shared the following documentary information with the NAAG:

- Backpage.com Supplemental Responses, *Without Prejudice*, to NAAG Requests for Information;
- In the matter of Backpage.com Affidavit of Carl Ferrer; and
- Sample Backpage.com Prohibited Words, Acronyms and Codes

*See* Exhibit 3 at 6. Backpage shared these materials with the NAAG subject to a confidentiality agreement between Backpage and NAAG. Presumably, we could obtain these materials from NAAG or the Washington State Attorney General through a grand jury subpoena, but we run the risk of NAAG revealing our investigation. Given that risk, we have decided, at this time, to refrain from subpoenaing the materials.

## **B. How it Works**

Individuals can post advertisements by clicking on the “Post Ad” button at the top of each metro region website, and selecting the section or category under which they want their advertisement to be displayed. Exhibit 4. For an “adult entertainment” posting, users select that link, and then select a sub-category, such as “escorts,” “body rubs,” or “adult jobs.” Exhibit 5.



Users then select the metro region where they want to post their advertisement. Exhibit 6.

## **I. Posting Rules**

After selecting the desired metro region, the poster must agree to the "Posting Rules," which provide the following rules and prohibitions on posting advertisements:

You agree to the following when posting in this category:

- I will not post obscene or lewd and lascivious graphics or photographs which depict genitalia or actual or simulated sexual acts;
- I will not post any solicitation directly or in "coded" fashion for any illegal service exchanging sexual favors for money or other valuable consideration;
- I will not post any material on the Site that exploits minors in any way;
- I will not post any material on the Site that in any way constitutes or assists in human trafficking,
- I am at least 18 years of age or older and not considered to be a minor in my state of residence.

**Any post exploiting a minor in any way will be subject to criminal prosecution and will be reported to the Cybertipline and law enforcement.**

Any post with terms or misspelled versions of terms implying an illegal service will be rejected. Examples of such terms include without limitation: 'greek', "gr33k", bbbj', 'blow', 'trips to greece', etc. Postings violating these rules and our Terms of Use are subject to removal without refund.

Exhibit 7 (emphasis in original).<sup>1</sup>

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<sup>1</sup>Note, though, that the "escorts" sub-section bears a disclaimer suggesting that nudity is common on the website. Specifically, the disclaimer reads:

This section contains sexual content, including pictorial nudity and adult language. It is to be accessed only by persons who are 18 years of age or older (and is not considered to be a minor in his/her state of residence) and who live in a community or local jurisdiction where nude pictures and explicit adult materials are not prohibited by law. By accessing this website, you are representing to us that you meet the above qualifications. *A false representation may be a criminal offense.*

## 2. Write Ad

Posters are then directed to the Write Ad section, where they compose the subject and text of their posting, as well as upload other relevant information. The Write Ad section outlines the rules for creating advertising content:

### NOTICE:

- Do not post naked images, e.g. uncovered genitalia, bare butts, nipple or nipple area, sex acts, etc.
- Do not post images using transparent clothing, graphic box or pixelization to cover bare breasts or genitalia
- Pricing for legal adult services must be for a minimum of one hour  
Example: 15 minute services are not allowed, no blank pricing, etc.
- Ads can be a maximum length of 500 characters
- Do not use code words such as 'greek', gr33k 'bbbj', 'blow', GFE, PSE, 'trips to greece', etc.
- Do not suggest an exchange of sex acts for money.
- Do not post content which advertises an illegal service.

Postings not complying with the **terms of use** are subject to removal.

Exhibit 8 (emphasis in original).

Posters are required to provide a title, their age, the advertisement copy, and an e-mail address. The poster is also permitted to identify his/her location and upload images. Exhibit 8.

To proceed to the next step, posters are required to agree to terms of use, and the following provision:

By placing this ad I agree to the terms of use. I confirm and

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I confirm and represent that I am 18 years of age or older (and am not considered to be a minor in my state of residence) and that I am not located in a community or local jurisdiction where nude pictures or explicit adult materials are prohibited by any law. I agree to report any illegal services or activities which violate the Terms of Use. I also agree to report suspected exploitation of minors and/or human trafficking to the appropriate authorities.

I have read the disclaimer and agree to all rules and regulations including the Terms of Use.

represent that I am at least 18 years of age or older (and am not considered to be a minor in my state of residence) and that I am not located in a community or local jurisdiction where nude pictures or explicit adult materials are prohibited by any law. I further represent and warrant that this posting does not contain any obscene or lewd and lascivious graphics or photographs or graphics or photographs which depict or simulate sexual acts.

Exhibit 8.

### **3. Preview Ad**

Users are then directed to a Preview Ad page, which confirms the price to be paid to backpage for posting the advertisement. The user proceeds to the next stage of posting by clicking on the "Place Ad Now" button. Exhibit 9.

### **4. Age Verification**

Next, users are directed to verify their age. In the Age Verification section, users are required to input their first name, last name, date of birth, and zip/postal code, and then click on the "Continue" button. Exhibit 10. Age verification at this stage is not required in all sub-categories. For example, a user can does not need to verify his/her age at this step in posting in the "bodyrub" sub-category.

### **5. Payment**

Finally, users are directed to a Payment section, where they are required to provide a payment instrument and the following information:

Name  
Address  
City  
State/Province  
Zip/Postal Code  
Phone Number (optional)

Card Type  
Card Number  
Expiration  
CVV Code

Exhibit 11

### **6. Report Ad**



Every post on Backpage also contains a “Report Ad” link at the top of the page. Users who click on the link are directed to a page, which asks the user for the basis of the complaint. There are three options, which can be selected by clicking on the appropriate radio button:

- Inappropriate or Illegal Content - If this involves a threat to a child or an image of child exploitation, please email [abuse@backpage.com](mailto:abuse@backpage.com) the URL of the posting.
- Over Posted / Spam
- Wrong Category

Exhibit 12.

Electronic reporting of a post does **not** result in the immediate removal of the post. Instead, Backpage responds to the reporting user that:

If you accidentally reported this ad, don't worry. It takes multiple reports from multiple people for an ad to be removed.

If this involves a threat to a child or an image of child exploitation, please email [abuse@backpage.com](mailto:abuse@backpage.com) the URL of the posting.

Exhibit 13.

As discussed in more detail below, law enforcement has been able to successfully contact Backpage and obtain immediate removal of certain posts.

### **C. Backpage's Attempts to Limit Child Exploitation**

Much like Craigslist before it, Backpage has attempted to implement certain procedures and controls to prevent the adult services sections of its website from being used to traffic and exploit minors. In a recent editorial, responding to a column written by *New York Times* columnist Nicholas Kristof criticizing Backpage for its role in the child sex trafficking industry, *Village Voice Media* claimed that “Backpage dedicates hundreds of staff to screen adult classifieds in order to keep juveniles off the site and to work proactively with law enforcement in their efforts to locate victims.” See Exhibit 14, *What Nick Kristof Got Wrong: Village Voice Media Responds*, The Village Voice, March 21, 2012.

Backpage has been reluctant to provide specific details, at least publicly, about its screening procedures and other policies it has implemented to prevent advertisements for child prostitution on its website. Exhibit 15, Letter from Samuel Fifer of SNR Denton US LLP, Counsel to Backpage.com, to Hedda Litwin, National Association of Attorneys General, dated September 23, 2011, see also Exhibit 16, Letter from National Association of Attorneys General to Samuel Fifer Re: Backpage.com's ongoing failure to effectively limit prostitution and sexual trafficking activity on its

website, dated August 31, 2011.<sup>2</sup> We are aware, however, through consultation with law enforcement and from Backpage's public statements, that the website has taken certain steps to prevent exploitation of minors on its adult services website. These include the following:

- Personalized screening of images and advertisements. Backpage contends that it has a team of individuals screening all advertisements within 20 minutes of upload. *See* Exhibit 17. Backpage.com. Safety and Security Enhancements. <http://blog.backpage.com> (last visited March 29, 2012). According to Backpage, it has implemented a no nudity policy, as well as stricter image content policies, in an attempt to prevent the publication of advertisements involving juveniles. *See* Exhibit 17. Backpage further claims to have "built [a] quality assurance tool to increase ad moderator effectiveness" and to have implemented a "two-tier system used to moderate content to increase quality of ad review." *See* Exhibit 17. Backpage also states that it has implemented an "ad moderator accountability system . . . to increase quality and efficiency and moderation staff increased significantly [sic]." *See* Exhibit 17.

We have very little information about precisely how this screening process works, how many individuals are involved, or what type of image standards are in place. In its response to the NAAG, Backpage claimed that information related to the "individualized or hand-review process undertaken by Backpage.com, including the number of personnel assigned to conduct such review" was "proprietary," but agreed to provide it to the NAAG "under separate cover. As noted above, Backpage recently provided some information to NAAG pursuant to a confidentiality agreement, but we have not yet reviewed that information. Exhibit 15.

FBI Special Agent Steve Vienneau, who heads the Innocence Lost Task Force (ILTF) in Seattle, advises us that Backpage personnel have, on many occasions, forwarded him advertisements that appear to contain pictures of juveniles. According to SA Vienneau, these advertisements have either been identified by Backpage screeners as potentially involving juveniles, or have been "flagged" by Backpage users as potentially offensive or illegal. SA Vienneau further advises that Backpage has been very cooperative at removing these advertisements at law enforcement's request.

While this type of manual screening is helpful, even an individual review of all posted images will not ensure that minors are not exploited on the website. As an initial matter, many prostitutes who advertise online – adults as well as juveniles

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<sup>2</sup> In his September 23 letter, Fifer states that details related to Backpage's screening and review process "involve proprietary or law enforcement-sensitive" materials, and advises that Backpage will provide such information to the NAAG "under some reasonably agreed-upon confidentiality protocol." *See* Exhibit 15 at 3.



– post pictures of individuals other than themselves. Moreover, the photographs of many juvenile victims are posed in such a way that a viewer cannot discern her age. Finally, some juvenile victims may simply appear to look older than eighteen in certain photographs. For all these reasons, even a manual review of all advertisements prior to posting will not ensure that children are not trafficked on Backpage.

- Screening of advertisements for prohibited terms. Backpage claims that “keyword searches” are “conducted across site to locate inappropriate or illegal content,” and states that it utilizes a list of “banned” and “inappropriate” terms “to identify and prevent illegal content.” *See* Exhibit 17. In its response to the NAAG, Backpage maintained that it has “newly upgraded and automated filters [that] have already banned several thousand terms from ads, many of them code words or intentionally misspelled words designed to circumvent standard filters.” *See* Exhibit 15. The company stated that more detailed information regarding these filters was proprietary, and said that it would “submit to [the NAAG] under separate cover a sample of banned terms and phrases and the processes under which terms, URLs, IP addresses, and other proprietary information are blocked.” *See* Exhibit 15.
- Credit card fee for all advertisements. Backpage has followed Craigslist’s policy, initiated at the suggestion of the NAAG, of charging a fee for each adult services advertisement. The benefits of this policy are threefold: it reduces the volume of advertisements, it provides information to law enforcement about a particular advertisement, and it (ostensibly) makes it less likely that a minor will be able to post advertisements. Unfortunately, the credit card requirement has not been successful in deterring child exploitation on the website, as both pimps and juvenile prostitutes are able to procure prepaid, reloadable credit cards with very little difficulty.

#### **D. Cooperation With Law Enforcement**

In its September 2011 letter to the NAAG, Backpage states that it has “pledged to work cooperatively with law enforcement to protect children” and contends that it has “already taken bold measures to remove postings on our site that could in any way involve child trafficking.” *See* Exhibit 15 at 1. Indeed, information provided to us by SA Vienneau and other members of the Innocence Lost Task Force confirm that, unlike virtually every other website that is used for prostitution and sex trafficking, Backpage is remarkably responsive to law enforcement requests and often takes proactive steps to assist in investigations. Some of the ways that Backpage assists law enforcement include the following:

- Prompt and complete responses to subpoena requests. Backpage records can provide a goldmine of information for investigators seeking to locate an exploited child or build a sex trafficking case. Backpage estimates that it responds to approximately 100 subpoenas from law enforcement each month, and often turns



around responses to those subpoenas the same day. Furthermore, with respect to any child exploitation investigation, Backpage often provides records within the hour. *See* Exhibit 15 at 5.

SA Vienneau and other members of the ILTF confirm that Backpage quickly and thoroughly responds to subpoena requests. They also note that even without a subpoena, in exigent circumstances such as a child rescue situation, Backpage will provide the maximum information and assistance permitted under the law. This information includes IP addresses with time, date, and time zone stamps, e-mail addresses, full credit card data, telephone contact data (if available), and all images as four-color electronic documents.

- Removing and/or blocking postings. SA Vienneau reports that on many occasions, at the request of law enforcement, Backpage has removed postings believed to involve juvenile victims, or victims who are being forced or coerced into prostitution. In addition, Backpage has complied with law enforcement requests to remove postings interfering with an investigation (e.g., where the post is alerting users to a sting). *See* Exhibit 15 at 5.

Backpage has also agreed to block future postings from users when law enforcement has advised it that the user is engaged in illegal activity. However, it is not known precisely what steps Backpage takes to block known illegal users from posting again. Moreover, it is unknown what, if any, steps Backpage takes in response to user-generated complaints about particular advertisements.

- Cooperation with NCMEC. As noted above, Backpage has on its website a link to the National Center for Missing and Exploited Children (NCMEC)'s CyberTipline, which is the national clearinghouse for leads and tips regarding crimes against children on the internet. According to Ernie Allen, the president and CEO of NCMEC, Backpage made 2,695 reports in 2011 to NCMEC regarding advertisements on its site that its personnel suspected involved the sexual trafficking of children. *See* Exhibit 18, Testimony of Ernie Allen, President and CEO of the National Center for Missing and Exploited Children, to the Institute of Medicine, Committee on Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States, January 4, 2012, at 4. (Allen noted in his testimony that this surge of reports was in response to a letter from the NAAG to Backpage expressing its concern about the prevalence of child exploitation on its site.)

Backpage states that it has regular monthly meetings with NCMEC staff, and has "received invaluable suggestions from NCMEC as to available online tools and resources for deterring, reporting and removing objectionable postings." *See* Exhibit 15 at 6. In addition, at law enforcement's request, Backpage has added further information to each NCMEC report, including the user name of the Backpage staff member reporting the post in order for law enforcement to contact

them directly for further information. *See* Exhibit 15 at 2. Backpage contends that it has also worked with NCMEC to develop logarithmic “screens” that detect and filter terms that are believed to be improper or that propose an illegal transaction. *See* Exhibit 15 at 2.

- Proactive reports to law enforcement Backpage’s CyberTipline reports are sent to both NCMEC and state/local law enforcement. *See* Exhibit 15 at 6. Law enforcement officers are directed to work with the Backpage staff member who originally reported the post in order to develop further information about an investigation.
- Trial testimony. Backpage personnel regularly provide live testimony at trial to authenticate the evidence against defendants who have utilized Backpage to engage in sex trafficking. *See* Exhibit 15 at 4.
- Aid to law enforcement Backpage has prepared and distributed law enforcement guides with FAQ to expedite investigations. *See* Exhibit 15 at 4. In August 2011, Backpage held two workshops for law enforcement agencies at the Crimes Against Children Conference in Dallas. At those workshops, Backpage distributed its law enforcement guides, described the data it can secure for law enforcement, and fielded questions regarding how it handles sting postings and future tools requested by law enforcement. *See* Exhibit 15 at 5.

In addition to these steps, SA Vienneau reports that Carl Ferrer, Backpage’s founder and a vice president at Village Voice Media, has provided extensive, proactive support to law enforcement in several recent investigations. According to SA Vienneau, on several occasions, Ferrer has taken information provided by law enforcement about a potentially illegal advertisement, and then conducted an independent investigation to gain additional information about the individuals posting the advertisement and provided that information to the FBI.

For example, on January 31, 2012, SA Vienneau sent Backpage a request to preserve records related to three potentially illegal advertisements. In response, Ferrer sent an email stating that he was having his staff preserve records relating to those accounts, and also “doing a search by phone number for those ads possibly under different email addresses.” Ferrer also stated that Backpage personnel had “found links to other [websites] with those matching phone numbers. The twitter link is very explicit. It has pretty close to all nude pic [sic] and a pic of her pimp (possibly).” Exhibit 19, E-mail from Carl Ferrer to Steve Vienneau re: Your record request and a twitter account we found, dated January 31, 2012. Later that day, Ferrer sent another email to Vienneau with a link to the victim’s Facebook page, and noted that “we keep hearing facebook has been used to recruit by criminals, so facebook may be another good source of information.” Exhibit 20, E-mail from Carl Ferrer to Steve Vienneau re: Ads still live, dated January 31, 2012.

On February 22, 2012, Ferrer sent Vienneau an email suggesting ways that law enforcement could assist Backpage in identifying juvenile victims. Specifically, Ferrer



suggested that law enforcement provide Backpage with phone numbers of individuals “known to be involved in juvenile prostitution that we could enter as alerts . . . if a phone number is triggered, a NCMEC report goes out stating ‘a phone number given to us by law enforcement triggered this cyber tip alert.’” Ferrer noted that “this might be more useful than just looking at the pic and saying the model looks too young.” Exhibit 21, E-mail from Carl Ferrer to Steve Vienneau re: Ads still live, dated February 22, 2012. According to Vienneau, he has had a number of conversations with Ferrer, both on the phone and via email, about individual investigations and ways to ensure that minor victims are not trafficked on Backpage. *See* Exhibit 22, E-mails from Carl Ferrer to Steve Veinneau re: FW Preservation request, dated March 15 and March 16, 2012.

### **III. Legal Analysis**

We have considered two different theories of prosecution against Backpage: Title 18, United States Code, Section 1591 and Title 18, United States Code, Section 1589. For the reasons explained below, we believe that an investigation focused on violations of Section 1591 is the only viable avenue of prosecution.

#### **A. Sex Trafficking of Children or by Force, Fraud, or Coercion**

Title 18, United States Code, Section 1591(a) provides for punishment for

Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

...

(e) In this section:

(5) The term “venture” means any group of two or more individuals associated in fact, whether or not a legal entity.

In any prosecution under Section 1591, the government would be required to prove that (1) the defendant knowingly benefitted financially from participating in a venture; (2) the acts engaged in by the venture were in or affecting interstate commerce; (3) the venture recruited, enticed, harbored, transported, provided, or obtained by any means a person; (4) the defendant knew, or recklessly disregarded the fact, that the person was under the age of eighteen; and (5) the defendant knew, or recklessly disregarded the fact, that the minor would be caused to engage in a commercial sex act. 18 U.S.C. § 1591(a)(2); *cf. United States v. Wild*, 143 Fed. Appx. 938 (10th Cir. 2005); *United States v. Jones*, 2007 WL 2301420, at \*6 (N.D. Ga. 2007) (elements of sex trafficking by force are either that defendant “(1) knowingly (2) in or affecting interstate commerce (3) recruited, enticed, harbored, transported, provided or obtained, by any means, a person (4) knowing that fraud, force or coercion would be used to cause (5) the person to engage in a commercial sex act, OR (1) knowingly (2) benefitted financially from (3) participation in a venture which engaged in or affected interstate commerce (4) and which recruited, enticed, harbored, transported, provided, or obtained, by any means, a person (5) knowing that fraud, force or coercion would be used to cause the person (6) to engage in a commercial sex act.” *United States v. Wilson*, 2010 WL 2991561, (S.D. Fla. 2010).

Section 1591(a)(2) does not require proof that a defendant personally “recruited, harbored, transported, provided or obtained a person for commercial sex.” *United States v. King*, 713 F. Supp. 2d 1207, 1215-16 (D. Hawai’i 2010). Instead, Section 1591(a)(2) simply requires that the defendant financially benefitted from a venture (either a pimp and a prostitute, several pimps working together, or a pimp and individuals who worked for him (non-prostitutes)) which recruited, enticed, harbored, transported, provided or obtained (hereinafter “recruited”) a person for commercial sex. In other words, the government would be required to prove that the venture involved a minor who was recruited for commercial sex, but not that the target of this investigation, Backpage, did the recruiting.

Only one court – a magistrate court opinion from the Southern District of Florida, later adopted by the district court – has defined “reckless disregard” in the context of Section 1591. *See Wilson*, 2010 WL 2991561, at \*6 (“‘reckless disregard’ means ‘to be aware of, but consciously and careless ignore, [sic] facts and circumstances clearly indicating that the person’ had not yet achieved the age of majority.”).<sup>3</sup>

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<sup>3</sup>The *Wilson* court also added – erroneously – an additional element where the government proceeds to prove a violation of Section 1591(a)(1) under the *mens rea* theory of reckless disregard. In *Wilson*, the court examined Section 1591(c), which was added as part of the 2008 amendments to Section 1591 that also added the “reckless disregard” scienter provision to Section 1591(a). The *Wilson* court concluded that “in a prosecution under [Section 1591(a)(1)] in which the defendant had a reasonable opportunity to observe the person . . . the



Although “reckless disregard” is also the *mens rea* standard required under Title 8, United States Code, Section 1324, the Ninth Circuit has also not defined the standard in the context of Section 1324.<sup>4</sup> “‘Reckless disregard’ has been defined by other circuits [in the context of Section 1324] as being aware of facts which, if considered and weighed in a reasonable manner, indicate a substantial and unjustifiable risk that the alleged aliens were in fact aliens and were in the United States unlawfully.” *See* Ninth Circuit Model Jury Instruction

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government need not prove that the defendant knew that the person had not attained the age of 18.” Instead, the court reasoned, Section 1591(c) required the government to prove that the defendant either actually knew that the person had not yet reached the age of majority, or that the defendant recklessly disregarded the person’s age *and* had a reasonable opportunity to observe the person. In other words, “should the United States choose to establish a violation of Section 1591(a) by showing recklessness, in addition to the first three elements of Section 1591(a), it must prove beyond a reasonable doubt both that the defendant recklessly disregarded the person’s age and that the defendant had a reasonable opportunity to observe the person.” *Wilson*, 2010 WL 2991561, at \*6 (citing *United States v. Robert Cox*, Case No. 09-60243-CR-COHN (S.D.Fla.2010)).

This interpretation flies in the face of both the plain statutory language and the legislative history. Section 1591(c) was added to the statute to cover cases in which a defendant contends that he did not know the victim was under the age of eighteen. According to the amendments’ sponsors, “[i]n such cases, the prosecution will be exempted from having to prove beyond a reasonable doubt that a defendant who had a reasonable opportunity to observe the person recruited, enticed, harbored, transported, provided, obtained or maintained knew that the person had not attained the age of 18 years.” *See* 154 Cong. Rec. H10888-01, H10904 (Dec. 10, 2008). The *Wilson* court’s interpretation would impose a greater burden on the government in cases involving underage victims than in cases involving adult victims who were coerced to commit commercial sex acts, in that it would be insufficient for the government to prove that the defendant acted in reckless disregard of a minor victim’s age if the defendant did not have a reasonable opportunity to observe the victim. By contrast, in cases involving coercion of adult victims, reckless disregard alone would be sufficient. We have found no courts that have followed *Wilson*’s interpretation of the government’s burden for proving reckless disregard. That said, should courts within this district adopt the *Wilson* court’s additional element, it would make proof against Backpage in a 1591(a)(2) prosecution nearly impossible.

<sup>4</sup>Without any significant discussion, the Ninth Circuit has found the evidence sufficient to convict a defendant under 1324 where the evidence: (1) showed that the defendant “turned a blind eye toward” the fact in question, *United States v. Hernandez-Orellana*, 539 F.3d 994, 1003 (9th Cir. 2008); (2) “support[ed] an inference that [defendant] either knew or suspected his passengers of having crossed the border illegally but deliberately chose not to confirm that suspicion with questions,” *United States v. Solano*, 82 Fed. Appx. 563, 565-66 (9th Cir. 2003) (Memorandum Disposition).

9.2, Comment (citing *United States v. Zlatogur*, 271 F.3d 1025, 1029 (11th Cir. 2001), *cert. denied*, 535 U.S. 946 (2002); *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992)).

## **B. Forced Labor**

Title 18, United States Code, Section 1589(a) criminalizes providing or obtaining the labor or services of a person by any one of, or any combination of, the following means:

- (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
- (2) by means of serious harm or threats of serious harm to that person or another person;
- (3) by means of the abuse or threatened abuse of law or legal process; or
- (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor services, that person or another person would suffer serious harm or physical restraint.

Section 1589(b) also provides for punishment for anyone who

... knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any means of described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any such means[.]

As with Section 1591, the term “venture” refers to any group of two or more individuals associated in fact, whether or not a legal entity.

In a prosecution under Section 1589(b), the government would be required to prove that Backpage (1) knowingly benefitted (2) from participation in a venture (3) which engaged in the providing of labor or services of a person through any of the means described in subsection (a) –that is, through force, threats of force, abuse or threatened abuse of the legal system, or through any action taken to cause a victim to believe that harm would come to her or others if she did not engage in prostitution – and (4) that Backpage knew or recklessly disregarded the fact that such actions were taken to cause the victim to engage in prostitution

The challenges of such a prosecution are myriad. While the government might be able to prove that



Backpage financially benefitted by permitting a particular pimp to post advertisements for a victim who were being forced to engage in prostitution through one of the means articulated in the statute, it would likely be difficult, if not impossible, to show that Backpage knew or recklessly disregarded the circumstances surrounding *that particular victim's* prostitution activities. As set forth above, because the advertisements are posted electronically, rather than in person, Backpage personnel have no interaction with either pimps or their victims, and thus would have no opportunity to form any sort of opinion as to whether a victim is being forced or coerced into prostituting. Indeed, it seems that the only way the government could establish knowledge or reckless disregard would be if evidence existed showing that Backpage had received some information, from either law enforcement or a concerned citizen, who was aware that a particular victim was being forced or coerced into prostituting, but nevertheless permitted advertisements for that victim to be posted. The probability of developing such evidence seems unlikely at best. As a result, we do not recommend proceeding under a Section 1589 theory.

### C. Prosecution Under State Law

On March 28, 2012, the Washington State Legislature enacted SB6251, a bill designed to regulate the advertising of commercial sexual abuse of a minor. Specifically, SB6251 makes it a crime if an individual “knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in the state of Washington and that includes the depiction of a minor.” SB6251. The act further makes it no defense that the publisher did not know the age of the minor depicted in the advertisement, unless the publisher can show that it made a reasonable bona fide attempt to ascertain the true age of the minor depicted prior to publication.

Although it is being hailed as the first of its kind, Washington SB6251 is will likely fail against a challenge that it violates the federal Communications Decency Act (“CDA”). 42 U.S.C. § 230. The CDA immunizes certain interactive computer service providers from liability for state law claims arising from the publication of third-party advertisements. The CDA defines interactive computer service as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.” 42 U.S.C. § 230(f)(2). It provides that “[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider,” that is, any “person that is responsible in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 42 U.S.C. §§ 230(c)(1) and (f)(3). Accordingly, a variety of state law claims against internet computer service providers, including Backpage, have been dismissed based on CDA immunity. *See, e.g., M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011); *see also Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Gibson v. Craigslist, Inc.*, 2009 WL 1704355, at \*4 (S.D.N.Y. June 15, 2009). There is no apparent reason why this same rationale will not also apply to SB6251.

#### IV. Proving that Backpage Violated Section 1591

Proving that Backpage knowingly “benefit[ed] financially” from a “venture” should not be difficult. Backpage charges for placement of advertisements of “escorts” (\$7 per advertisement) and “body rubs” (\$5 per advertisement). There are a number of cases within this district where juvenile victims who were advertised on Backpage were prepared to, and did in fact, engage in commercial sex. In these cases, there are sufficient facts to show that an individual (*i.e.*, the pimp) knowingly recruited a minor victim, knowing that the victim would engage in a commercial sex act.

Moreover, proving that these ventures affected interstate commerce should similarly not be difficult. There are some cases where minor victims were moved across state lines, or used credit cards to post a Backpage advertisement, in connection with commercial sex. Moreover, Backpage’s headquarters and its computer servers are located in Arizona.

The key issue in any Backpage prosecution will be in proving that Backpage knew, or recklessly disregarded the fact, that (1) the victim was under the age of eighteen and (2) the victim would be caused to engage in a commercial sex act. In order to satisfy this element, the government will likely have to prove that the defendant was aware of facts *as to a particular victim* that, if considered and weighed in a reasonable manner, indicated a substantial and unjustifiable risk that the victim was under the age of eighteen and that the victim would be caused to engage in a commercial sex act.

##### A. Prosecution on a Theory of General Recklessness

One possible theory of prosecution would be to assert that as a general matter, Backpage is reckless because so many minors are able to successfully post advertisements. That is, Backpage is aware, by virtue of the myriad subpoenas it receives in connection with criminal prosecutions, that minors are finding ways to post commercial sex advertisements, and that Backpage’s screens and filters are not 100% effective in preventing such posting.

As an initial matter, if we decide to proceed with prosecuting a criminal case based on a theory of general recklessness, it will difficult, if not impossible, to prove the venture element of Section 1591. To prevail, we must show that Backpage financially benefitted from a particular venture involving a minor and commercial sex. However, merely showing that Backpage is reckless, generally, does not satisfy our burden to show that it was reckless with respect to a *particular* juvenile. Second, as described in more detail below, there are significant obstacles to establishing that Backpage is generally reckless.

##### 1. Backpage Conducts a Manual Review of Photographs Posted in Advertisements, and Even a Manual Review will not Identify all Juvenile Victims Posted

One of the principal ways that Backpage screens for minors on its website is by examining photographs and content of posts. However, based on the experience of law enforcement, many of the minor



victims who post on Backpage use photographs of other individuals, usually taken from other websites. These photographs depict individuals who either are, or appear to be, over the age of 18. Moreover, often it is difficult for trained investigators to conclude that individual depicted is under the age of 18 because images posted often hide or obscure faces or other body features that would be useful in determining age.

For example, one juvenile posted images of four different women over a six month period of time before actually posting an image of herself. Several of these postings contained photographs containing no depictions of the individual's face, and all of which appeared (to trained investigators) to depict women over the age of 18. When the victim finally posted an image of herself, it was still difficult to conclude that she was under the age of 18. It was not until she posted a second set of photographs of herself a week later that investigators believed that she might be under the age of 18. *See Exhibits 23 through 29.*

That these images are often stolen from other locations, and often do not contain any depictions of the individual's face, make it extraordinarily difficult to determine whether the actual poster is under the age of 18. Accordingly, even a manual review of all advertisements may not be sufficient to alert Backpage that a particular poster is a juvenile.

## **2. Backpage Employs an Array of Age Verification Protocols**

Another obstacle to prevailing on a "general recklessness" theory is the fact that Backpage also employs a number of age verification protocols that require a poster to affirmatively confirm that he/she is over the age of 18. First, there is a general disclaimer for users accessing the "adult entertainment" section of Backpage, which prohibits individuals under the age of 18 from accessing that portion of the website. Second, any individual that attempts to post content to the "adult entertainment" section, must "agree" that they are above the age of 18. Third, posters are required to input their age when preparing the content of their post and required to, again, confirm that he/she is over the age of 18. Fourth, posters posting for the first time are required to verify his/her age by inputting the date of birth and name on a screen titled "Age Verification." The system prevents individuals from posting who say that they are under the age of 18 in the Age Verification process.

Accordingly, Backpage will likely argue that if the poster was under the age of 18, then Backpage is a "victim" of fraud. In other words, Backpage will likely defend that posters under the age of 18 lie to them, and there is no way of electronically verifying the age of the poster.

Additionally, Backpage, like other classified websites, requires posters to use a credit card. Although once believed to be an effective tool in preventing minors from making posts, the credit card requirement is largely believed to be useless in preventing older minors from posting to these websites.

## **3. Requiring Additional Age Verification Protocols Has Practical and Constitutional Implications**

In any prosecution, Backpage will likely argue that their age verification protocols are standard throughout the industry, and that requiring additional age verification protocols or procedures is both impractical and a constitutional limitation on free speech.

Most purveyors of online adult content “verify” age in a manner similar to Backpage. Generally, they require users or visitors to “agree” that they are over the age of 18, and often require purchases be made using a credit card as an additional measure of age verification. As a practical matter, requiring an online business to conduct in-person age verification (such as required by the *Seattle Weekly*) would bring online business to a halt, as it threatens the very fabric of the Internet.

Although some vendors are generating software and mechanisms to further verify age online, they are not 100% effective, and in any event, requiring any such procedures has constitutional implications. More specifically, in 1998, Congress enacted the Child Online Protection Act (COPA), 42 U.S.C. § 231; *see also ACLU v. Mukasey*, 534 F.3d 181, 184 (3d Cir. 2008). COPA established criminal penalties for anyone who knowingly posted material harmful to individuals under the age of 17 on the internet for commercial purposes. 42 U.S.C. § 231. COPA provided an affirmative defense for website operators who restricted access to minors by requiring the use of a credit card, debit account, “adult access code” or “adult personal identification number,” a “digital certificate that verifies age,” or “any other reasonable measures that are feasible under available technology.”

The ACLU challenged the constitutionality of the statute, and after a series of legal proceedings at the appellate court and the Supreme Court, the Eastern District of Pennsylvania held a bench trial on the merits to the ACLU’s challenge. *ACLU*, 534 F.3d at 186. Following the bench trial (which was affirmed on appeal), the district court concluded that the statute was unconstitutional. *Id.* In its findings of fact, the district court found that there was “no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor.” *Id.* at 195. Moreover, the district court found that “Web sites . . . which desire to provide free distribution of their information will be prevented from doing so,” resulting in an unconstitutional limitation on free speech. *Id.* at 196-97.

Additionally, the trial court recognized the fact that the individual entering age verification information into a web browser is not necessarily the person whose information is being entered, and that while requiring a credit, debit or other payment card to be entered to obtain access might deter a five-year-old, it would be unlikely to deter a motivated teenager.

These findings were echoed in a recent study commissioned by forty-nine state attorneys general. The Internet Safety Technical Task (ISTT) Force expressed “cautious optimism” at progress being made both in the field of age verification and in technologies that filter Internet content, but concluded that such technology is not perfect. The study also pointed out that almost all of the age-verification technologies that they examined presented privacy and security risks that would have to be weighed against any benefits they provided.



Notwithstanding, Backpage actually implements at least one of the affirmative “defenses” proscribed by the now-invalid COPA provisions, namely the requirement that posters provide a credit card. That requirement, however, has been somewhat compromised by the advent of prepaid credit cards that can be purchased at a variety of retail locations, such as Walmart, Safeway, etc.

**4. Posting Data Collected by Backpage Does Not Indicate that the Poster is Under the Age of Eighteen.**

Backpage will also likely defend by arguing that even analysis of other data provided or captured during the posting process does not indicate whether a particular poster is under the age of 18. Below is a summary of the data that Backpage collects during the posting process, and our analysis of some of this data.

**a. Backpage Data**

In general, posts to Backpage include text, photos, a telephone number, the poster’s age (as entered by the poster, *see* Exhibit 11), and a Post ID, which uniquely identifies a given post. Posts also often contain links to other posts placed elsewhere on Backpage. Thus, a post for a tractor may link to other advertisements that the user has made to other farm equipment. Backpage has the ability to retrieve “live” posts; that is, posts that are actively viewable on the Backpage website. Backpage’s data retention policy, however, is unknown, although it appears from other child sex trafficking cases that Backpage maintains postings for a period time and they can be retrieved pursuant to a subpoena.

Based on review of subpoena responses, we have developed a basic understanding of what data Backpage collects when a individual posts an advertisement. The information Backpage is summarized as follows:

- |    |                             |   |
|----|-----------------------------|---|
| a. | <b><u>Invoice date:</u></b> | Date of payment   |
| b. | <b><u>Status:</u></b>       | Whether the post is active or not,  |
| c. | <b><u>Category:</u></b>     | Category and subcategory used to post advertisement, such as “adult entertainment: escorts” or “adult entertainment: body rubs” |
| d. | <b><u>Ad:</u></b>           | Title of advertisement (Exhibit 6);   |
| e. | <b><u>User:</u></b>         | E-mail address for user who created the account used to post the advertisement (Exhibit 6);                                     |
| f. | <b><u>Name:</u></b>         | Name provided by poster at the time of payment (Exhibit 9);   |
| g. | <b><u>Address:</u></b>      | Address provided by poster at the time of payment (Exhibit 9);  |
| h. | <b><u>City:</u></b>         | City provided by poster at the time of payment (Exhibit 9);   |
| i. | <b><u>State:</u></b>        | State provided by poster at the time of   |

- |    |                            |   |
|----|----------------------------|---|
| j. | <b><u>Zip:</u></b>         | payment (Exhibit 9);<br>Zip provided by poster at the time of<br>payment (Exhibit 9). |
| k. | <b><u>Phone:</u></b>       | Phone number provided at the time of<br>payment (Exhibit 9).                          |
| l. | <b><u>IP:</u></b>          | IP address from where advertisement is<br>posted;                                     |
| m. | <b><u>Card Number:</u></b> | Credit card type, number and<br>expiration date;                                      |

Backpage can retrieve a copy of all other “live” posts made using a particular e-mail address and/or telephone number. Because Backpage captures additional data digitally in the above-listed series of fields, it is reasonable to expect that Backpage has some search functions that would also allow it to retrieve posts based on other data, such as Credit Card Number and Name. We have not, however, been able to confirm such capabilities. Backpage can also follow links on “live” posts to retrieve those “linked-to posts.”

Although Backpage provides some information regarding payment for the post, the meaning of the information is unclear. It appears, however, that in verifying the payment instrument used to pay for the post, Backpage checks the address provided by the poster to confirm the user’s identity.

#### **b. Analysis of Data Collected by Backpage**

Based on the review of numerous posts in the adult entertainment category of Backpage, it is clear that the fields of related posts often differ from one another. That is, for posts made using the same e-mail address, for example, there are often material differences in the other information provided, such as credit card number, billing address, and IP address. Specifically, in one case a poster using the e-mail address “tionamarie@gmail.com,” posted five different advertisements: one on July 22, 2011, two on September 4, 2011, one on January 15, 2012, and one on January 27, 2012. Data collected by Backpage is summarized for each of the posts as follows:



Date	7-22-11	9-4-11	9-4-11	1-15-12	-27-12
Post ID	7378800	7691855	7691757	8800724	8878169
Name	Tiona Rainwater	Tiona Rainwater	Tiona Rainwater	Johanna Holliday	Priscilla Graham
Title	~I Enjoy Strawberries~ Red Headed Fire Cracker II - 19	~Sexy Lil Chocolate Drop~Pleasing You Pleases Me - 18	~Sweet Sensation 2 Fulfill Your FANTASY ~ SWEET SASSY & CLASSY - 19	~Beauty Behind The Scenes~ - 21	* Juicy . & Thick * Get It While Its Hot !! - 18
Address	10710 se 236st	2900 175th st	2900 s 197th st	6018 NE Bligh Ct.	1385 71st se
Phone	206.3700009	206.3700009		206.3700009	206.3700009
IP	208.54.32.220	208.54.32.232	75.147.188.77	208.54.32.251	208.54.32.167
Credit Card	****3650	****7640	****7640	****5893	****3887
Text	Jewl 5'2" 130lbs 36b Petite	I'm Michelle Star I'm 5'4 120Lbs, I'm 5'2 Belizean & White	I'm Chanel Bentley 15lbs And I'm a 34B	Diamond	Hello im diamond Im 5'2" 130 lbs. With 36B's

The chart above, as well as analysis of other advertisements, shows that there are material differences between posts made by the same user account. For example, the two September 4th posts show that the user paid for two different advertisements, using the same credit card number, but with different text and photos, billing addresses, and IP addresses. The fact that Backpage is not confirming the billing address (*i.e.* street address) is not unusual – standard industry practice requires companies to verify generally three data points before approving a credit card transaction: name on the account, billing zip code, and CCV/CVV number. Although most retailers require additional information, there is no requirement that these separate data points be confirmed before obtaining approval from a payment processor.

Although there are a number of material differences indicating fraud (*i.e.* hard fraud indicators), training and experience suggests that this type of variation is common to posts advertising both adult and child prostitution. Nothing about the fact that the poster's information varies widely from post to post "indicates a substantial and unjustifiable risk that" the individual depicted is under the age of 18. Indeed, as set out in more detail above, based on training and experience, it is not clear from examination of the photographs that the individual depicted is under the age of 18. That the photographs for a given poster often differ from one post to another is similarly not indicative of child prostitution because adult prostitutes often provide different pictures between posts, and both groups of individuals often post images without any depictions of the person's face.

## **5. Backpage's Cooperation with Law Enforcement**

Finally, any prosecution of Backpage would likely have to overcome Backpage's efforts to actively cooperate with law enforcement. Arguably, Backpage's efforts to cooperate with law enforcement generally are not relevant to whether they recklessly disregarded that a particular poster was under the age of 18, but there is a significant likelihood that such evidence would be admissible at trial.

To the extent that such evidence is permitted, Backpage will likely trumpet what efforts it has taken to cooperate with law enforcement as evidence that it has not "disregarded" the risk that minors try to post on Backpage. Indeed, on the contrary, Backpage has made significant and proactive efforts to assist law enforcement as described above in Section II.D.

### **B. Prosecution in a Notice Case**

Based on our analysis, the most likely avenue of successful prosecution would focus on instances where Backpage has notice of the fact that a particular poster is a minor being offered for commercial sex. This is similar to prosecutions in the Section 1324 context, where ICE agents often notify a business that it is employing undocumented workers, and then make subsequent site visits to determine whether the business continues to employ them after receiving notice.

If Backpage was notified that a particular post was linked to the recruitment of a minor for commercial



sex, but evidence shows that Backpage did not successfully prevent that individual from posting again, we could make a strong case that Backpage consciously disregarded a substantial risk that the poster (or the individual depicted) was under the age of 18. That is, if we can identify instances where, despite getting notice that a particular post involved a minor recruited for commercial sex, Backpage permitted the juvenile to be posted on another advertisement, then this second post would constitute an instance where Backpage “recklessly disregarded” that an individual recruited for commercial sex was under the age of 18.

This theory of prosecution would eliminate Backpage’s likely defense that it (a) was “defrauded” by the poster who lied about her age and posted fake pictures; (b) could not tell from the images that the poster was under the age of 18; (c) does attempt to verify the age of the poster in line with the industry standard (including by requiring that posters use a credit card); and (d) is unconstitutional to require Backpage to implement more sophisticated/automated age verification procedures. That said, we would still have to prove that (1) Backpage received notice; (2) that the notice clearly indicated to Backpage that the post involved a minor involved in commercial sex; (3) the notice contained sufficient identifying information to allow Backpage to prevent the same juvenile from re-posting; and (4) that the juvenile nevertheless managed to re-post the advertisement.

There are, however, challenges, to such a “notice” prosecution. First, an undercover investigation based on this theory of prosecution would be unlikely to instigate behavior that could form the basis of a charge under Section 1591. As an initial matter, Section 1591 requires the existence of a venture. By its very nature in an undercover operation there is no venture (an association between two or more persons who have recruited a minor into sex trafficking). Thus, an undercover operation will not produce an event that we can charge.<sup>5</sup>

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<sup>5</sup>In a general theory of recklessness prosecution (*see* Section IV.A.), an undercover operation might be useful. We could formulate an undercover operation designed to “test” Backpage’s system to determine whether Backpage’s age-related screening features and procedures are effective. Such an operation would create fictitious postings, followed by notice to Backpage that the postings involve a minor. Agents would then attempt to make subsequent (post-notice) posting using information distinctly linked to the first post (for example, the same credit card, telephone number or e-mail address). If undercover agents are able to successfully make postings after notice is given, this would provide some relevant evidence that Backpage was generally reckless.

It should be noted that, based on information already provided by Mr. Ferrer and Backpage, it appears that there is a robust amount of screening and blocking takes place today. For example, as explained above, Backpage has agreed to block future postings and has worked with NCMEC in developing sophisticated processes for reducing illegal posts. Moreover, Backpage has affirmatively brought postings to the attention of law enforcement. This has resulted in the rescue of some juveniles, indicating that Backpage’s screening process is working and that it is identifying some victims.

Second, in order for this avenue of prosecution to be successful, the initial notice would likely have to be specific enough so as to provide Backpage with sufficient information to identify the poster. This would likely require that the notice included PostID or other information (such as e-mail address, telephone number, or credit card information) that would allow Backpage to identify any other advertisements for the minor in question. Assuming sufficient notice, the investigation would have to uncover instances where the minor posted a second time (post-notice) using the same e-mail account, credit card number, telephone number, or possibly photograph. If the minor re-posted without any one of these commonalities (as between the first and second post), there would be no way to prove that it was the same minor. That is, there must be some strong indicia that the new post was made by the same person who was previously identified as a minor. Indeed, if we cannot prove that the second post was made by the initial poster, then it is unreasonable – and likely fatal to any criminal prosecution – to hold Backpage responsible for failing to make the same connection.

Third, even if we uncover instances where Backpage continued to permit the minor to post advertisements, the minor would have to have some connection with this district to establish venue. While there are certainly a significant number of minors using Backpage in our district, finding an historic notice case might prove difficult, especially given that Backpage has continued to augment its screening and verification protocols. Venue may be more appropriate in Arizona where Backpage is headquartered.